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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
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9 Frederico Aguilar Murillo, et al.,)

No. CV-07-2581-PHX-GMS

10 Plaintiffs,)

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

11 vs.)

12 Servicios Agricolas Mex Inc., et al.,)

13 Defendants.)
14)
15)

16 Pursuant to the agreement of the parties, the Court held a non-jury trial on Plaintiffs'
17 complaint on August 23-25, 30-31 and September 1-2, 2011. The parties filed post-trial
18 memoranda on September 9, 2011. Pursuant to Federal Rule of Civil Procedure 52, the
19 Court hereby makes its findings of fact and conclusions of law.¹

20 **FINDINGS OF FACT**

21 1. Plaintiffs are 171 United States workers composed of nine United States
22 Citizens and 162 permanent legal residents of the United States. Although they are legal
23 permanent residents of the United States, most of them reside in or around the area of San
24 Luis, Mexico and/or San Luis, Arizona. Plaintiffs are harvest workers who worked for
25 Defendant Servicios Agricolas Mex, Inc. ("SAMI") during either the 2004-05 or 2005-06
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27 ¹On March 6, 2012 this Court received notice that Defendant Richard De Leon filed
28 for bankruptcy. The claims against him, therefore, are stayed pursuant to 11 U.S.C. § 362.

1 harvest seasons. There is a great disparity among them in terms of the amount of time that
2 they actually worked for SAMI during either or both of these seasons.

3 2. Plaintiffs bring claims against Defendants for failing to employ them, or extend
4 them offers of employment, during the 2006-07 citrus harvesting season that occurred in
5 southwest and central Arizona. Plaintiffs claim that such failures violated provisions of the
6 Migrant and Seasonal Agricultural Worker Protection Act (“AWPA”) 29 U.S.C. § 1800 et
7 seq (2009).

8 3. In addition, the nine U.S. citizen Plaintiffs—Harold Appling, Arturo Salgado
9 Bahena, Miguel Angel Rapan, Maria Miranda, Raul Garcia, Fenando Duarte Ochoa, Jose M.
10 Segura Sandoval, Octavio Serrano and Gustavo Zerega Espinoza—bring § 1981 claims
11 against the Defendants alleging that Defendants failed to hire them because they are U.S.
12 Citizens.

13 4. The Claims in the operative complaint are limited to the 2006-07 season.

14 5. Defendant SAMI is a farm labor contractor. It is an Arizona corporation,
15 incorporated in 2004. It is engaged in the business of providing farm harvesting services to
16 agricultural producers, including citrus growers, in Arizona.

17 6. Defendant Marlin Ranching Company (“Marlin Ranching”) is an Arizona
18 corporation incorporated in 1993. It farms citrus and owns or leases land on which Plaintiffs
19 picked lemons while they were employed with Defendants.

20 7. Defendant Marlin Growers Inc. (“Marlin Growers”) is an Arizona corporation
21 and non-profit agricultural cooperative incorporated in 1988 having as its members persons
22 or entities who grow citrus.

23 8. A citrus harvest season in Arizona extends from approximately late August or
24 early September of one year to late February or early March of the following year, with
25 pruning and related practices occurring thereafter.

26 9. After the discontinuation of the bracero program in the late 1960s, distinct
27 patterns began to emerge for hiring agricultural workers in central and western Arizona for
28 harvesting the annual citrus crop.

1 10. Yuma County, in western Arizona, adjusted to the loss of the bracero program
2 by becoming mostly able, over time, to provide sufficient domestic workers for citrus
3 harvesting in the Yuma Valley area. Such seasonal agricultural workers are either United
4 States citizens or permanent legal residents who live in or around San Luis, Mexico or San
5 Luis, Arizona.

6 11. Companies and farm labor contractors that wish to recruit seasonal agricultural
7 workers in San Luis generally do so at the corralons located there. Corralons are garages in
8 San Luis with associated parking lots in which farm labor contractors recruit workers and
9 store their buses. The buses are used for the daily transportation of the farm laborers to the
10 fields they will be harvesting during harvest season.

11 12. Each farm labor contractor's corralon is generally located in the same area of
12 San Luis. For a few days prior to the date on which the citrus harvest begins, those
13 companies renting corralon space will park their buses outside of their respective corralon.
14 The parking of the buses outside the corralon is a signal to the residents of the area that the
15 harvesting season is about to begin. The various contractors' foremen will generally be at
16 the corralon or at the border attempting to recruit harvest workers at this time.

17 13. While a number of workers will return to work for the same foreman and the
18 same farm labor contractor during successive harvest seasons, there is considerable turnover
19 in the workers that make up a foreman's crew both during the same harvest season, and from
20 year to year.

21 14. During the course of the same harvest season workers on a crew may choose
22 to work more or fewer days, change the foreman for whom they work, or change companies.
23 A foreman may decide to change the farm labor contractor for whom he and his crew work.
24 Because both workers and foremen are paid bonuses based on productivity, there is a desire
25 to work for a good company and a good foreman in fields that will be productive.

26 15. Those workers wanting to work in the harvest that have not already agreed to
27 work for a particular foreman or who wish to change the crew for which they work, report
28 to the corralons and sign up to work for a foreman, or make other arrangements separately

1 with a foreman. New workers are employed at the corralon throughout the duration of the
2 harvest season.

3 16. Workers are recruited at the corralons in San Luis to harvest fields in the Yuma
4 Valley area, including Bard, California. They are typically transported by their employer
5 from the corralon in San Luis to the harvest fields in Yuma Valley and back again to San
6 Luis.

7 17. Although a number of seasonal agricultural workers hired themselves out to
8 work in Yuma Valley from the corralons at San Luis, there were historical shortages of
9 adequate U.S. farm workers to accomplish the citrus harvest in the more central parts of
10 Arizona including White Wing, which is close to Dateland, Arizona, and in Maricopa and
11 Pinal counties. These locations are a lengthy commute from San Luis. A one-way commute
12 by bus between San Luis and White Wing, the closest location, takes between two to three
13 hours.

14 18. Prior to the 2006-07 harvest season, citrus growers in Maricopa and Pinal
15 counties had relied on the H-2A program² to recruit authorized Mexican workers to obtain
16 sufficient workers to harvest their annual citrus crop when they could not otherwise obtain
17 sufficient U.S. workers.

18 19. The H-2A program regulates the importation of non-resident temporary alien
19 agricultural workers. The program regulations are designed to protect the employment and
20 working conditions of citizens or permanent legal residents of the United States while
21 enabling employers to hire foreign workers when sufficient domestic employees are
22 unavailable.

23 20. The Marlin entities had fields to harvest in the Yuma Valley, at White Wing
24 and in Maricopa and Pinal counties.

25 21. Prior to the 2002-03 harvest season, William Chaney, the President of the
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27 ²Immigration and Nationality Act of 1952 § 101(a)(15)(H)(ii)(a), codified at 8 U.S.C.
28 § 1101(a)(15)(H)(ii)(a).

1 Marlin entities, called Ralph De Leon and determined that he and his company Servicios
2 Agricola Mexicano (“SAMCO”) would be interested in providing farm labor contracting
3 services in Arizona for the Marlin entities.

4 22. SAMCO is no longer a Defendant in this action.

5 23. At the time, Ralph De Leon’s son Richard was a management employee at
6 SAMCO, but he was principally involved in SAMCO’s California operations.

7 24. In the 2002-03 harvest season the Marlin entities employed SAMCO to harvest
8 their citrus crop. SAMCO recruited workers at the corralon in San Luis to work the Yuma
9 Valley fields. It is not apparent to the Court based upon the evidence provided whether
10 SAMCO obtained authorization to use H-2A workers to harvest the groves in central Arizona
11 during the 02-03 season.

12 25. In 2003-04, the Marlin entities again contracted with SAMCO for purposes of
13 obtaining their farm labor. Prior to the beginning of this harvest season, SAMCO made an
14 application to the United States Department of Labor for approval to bring in 200 Mexican
15 H-2A workers to harvest Marlin’s fields at 98500 Palomas Rd. in Dateland, Arizona (White
16 Wing).

17 26. The H-2A application was filled out and presented to the Department of Labor
18 by William Marrs—SAMCO’s attorney.

19 27. Although SAMCO requested 200 H-2A workers, the Department through
20 Arizona’s designated workforce agency determined that the barracks at White Wing only had
21 sufficient space to house 150 alien workers. Thus, on August 6, 2003, SAMCO’s application
22 was approved but for only 150 H-2A workers. The approval was subject to SAMCO’s
23 assurances made in the application process.

24 28. In 2004, Ralph De Leon’s wife became seriously ill requiring much more of
25 his attention. As a result, his son Richard became more involved in SAMCO’s Arizona
26 operations.

27 29. Subsequently, after discussions with his father, Richard formed his own farm
28 labor contracting company—SAMI.

1 30. During the 2004-05 season the Marlin companies contracted with both SAMI
2 and SAMCO to accomplish their citrus harvesting. SAMI took over SAMCO's operations
3 with respect to the citrus harvesting in Yuma Valley and in Bard, California and the related
4 transportation of workers to the orchards from the corralon at San Luis. SAMCO continued
5 to harvest the orchards in central Arizona using the authorized H-2A workers that it housed
6 at Marlin's barracks at White Wing.

7 31. Because SAMI was, in effect, replacing SAMCO in its operations in the Yuma
8 Valley, Richard De Leon and other SAMI management employees held a breakfast meeting
9 at the San Luis McDonalds, prior to the commencement of the 04-05 season, with the
10 foremen that had previously worked for SAMCO in the Yuma Valley area. The meeting was
11 to inform them of the season's approximate start date and to determine whether the foremen
12 who had worked for SAMCO the previous harvest season would be returning with their
13 crews to work for SAMI.

14 32. Oscar Agaayo Sr. and Oscar Agaayo Jr., who had been supervisors for
15 SAMCO, came to work as supervisors for SAMI. Jose Castano, who had been a foreman for
16 SAMCO in the 03-04 season, became a supervisor for SAMI in the 04-05, and 05-06 harvest
17 seasons. He reported to Oscar Agaayo Sr.

18 33. Leobardo Aguirre, Jose Gonzales, Humberto Gaxiola, and Julio Cesar De La
19 Rocha had also worked for SAMCO, and its predecessor C&F, and became foremen for
20 SAMI in 04-05. These foreman either recruited their past workers, or, to the extent it was
21 necessary or desirable, recruited new workers at the corralon at San Luis for SAMI.

22 34. SAMI management understood that it was after this McDonald's meeting or
23 other initial contact with the foremen that the foremen began re-assembling their former
24 crews and recruiting new crew members for the ensuing harvesting season.

25 35. Prior to the beginning of the 04-05 harvest season, the Department of
26 Economic Security sent out notices to the Yuma Valley workers who had worked for
27 SAMCO during the 03-04 harvest season who were receiving unemployment benefits. The
28 notices informed them of the date on which the 04-05 harvest season would begin and

1 directed them to report for work if they desired to remain eligible for unemployment benefits.
2 Richard De Leon acknowledges that SAMI would have benefitted from this notice to
3 previous SAMCO workers by obtaining a greater number of workers from San Luis to
4 harvest in Yuma Valley.

5 36. Because SAMCO, not SAMI, kept that part of the Marlin harvesting that used
6 H-2A employees, SAMCO again requested the Department of Labor to certify 150 H-2A
7 workers to reside at White Wing, and Buckeye to harvest Marlin's orchards in central
8 Arizona. This 04-05 harvest season SAMCO's application indicated that the workers were
9 to harvest 640 acres in Dateland (White Wing), 800 acres in Eloy, 80 acres in Maricopa, 320
10 acres in Surprise, and 12 acres in Phoenix. SAMCO proposed to provide housing at its
11 barracks locations both in White Wing and in Buckeye.

12 37. Again, the application was filled out and presented to the Department of Labor
13 by William Marrs—SAMCO's attorney.

14 38. SAMCO also sent to the Department two form letters that it had sent to the two
15 U.S. employees who worked the previous year at White Wing informing those two workers
16 that the same employment at White Wing would be available and to call if they were
17 interested in such work. Similarly SAMCO sent proof that it ran radio ads recruiting U.S.
18 workers and further provided two newspaper solicitations that it had taken out in a local
19 newspaper soliciting 150 citrus workers to work at White Wing.

20 39. SAMCO's application for 150 H-2A workers was approved and those workers
21 harvested Marlin's central Arizona orchards in 04-05. The approval was again subject to the
22 fulfillment of the assurances made by SAMCO in the application process.

23 40. During the 05-06 season, the Marlin companies again contracted with both
24 SAMI and SAMCO. SAMI and SAMCO continued to split the work as described above.
25 Thus, during the 05-06 season, SAMI again conducted that part of Marlin's harvest that
26 transported workers from the corralon at San Luis to harvest fields principally in the Yuma
27 Valley.

28 41. Again, Richard De Leon and other management employees held a breakfast

1 meeting at the San Luis McDonalds just prior to the harvest, to determine whether the
2 foremen who had worked for SAMI the previous harvest season would be returning to work
3 for SAMI. Aguirre, Castano, De La Rocha, Gaxiola, and Gonzalez all returned to work for
4 SAMI in the 05-06 season.

5 42. Because during the 05-06 harvesting season SAMCO again kept that part of
6 the Marlin harvesting that used H-2A employees, SAMCO sought and received certification
7 for approximately 100 H-2A workers to harvest specified acreage throughout the state prior
8 to the beginning of the harvest. That year, however, in addition to seeking H-2A workers to
9 harvest 640 acres of citrus groves at White Wing, 800 acres in Eloy, and 80 acres in
10 Maricopa, SAMCO sought approval to use H-2A workers to harvest 300 acres in the Yuma
11 Valley. Those 300 acres were specifically identified as being at County Road 14 and 6E and
12 County Road 13 and 6E. SAMCO only proposed to house the workers at the barracks in
13 White Wing.

14 43. Again, the application was filled out and presented to the Department of Labor
15 by William Marrs—SAMCO's attorney.

16 44. SAMCO sent to the Department proof that it ran radio ads recruiting U.S.
17 workers and further provided two newspaper solicitations that it had taken out in Spanish in
18 a local newspaper soliciting citrus workers to work at White Wing. It does not appear from
19 the exhibits submitted that any U.S. workers had worked for SAMCO the previous year at
20 White Wing.

21 45. SAMCO's application for 100 H-2A workers was approved. The application
22 specifically approved workers to harvest not only in Dateland, Eloy and Maricopa but also
23 in Yuma, Arizona. The approval was again subject to SAMCO's assurances made in the
24 application process.

25 46. Marlin had between 1000-1600 acres in citrus groves in the Yuma Valley in
26 the 05-06 harvest season. Evidence offered suggests that after that season, Marlin began to
27 sell its property in the Yuma Valley area due to the housing boom and the age of the citrus
28 groves.

1 47. Ralph De Leon decided to retire in 2006 and to terminate the operations of
2 SAMCO. Upon being informed of Ralph's decision, William Chaney, the director of the
3 Marlin entities, asked SAMI and Richard De Leon if it wanted to pick up the central Arizona
4 harvesting operations previously performed by SAMCO and his father. SAMI determined
5 that it would do so.

6 48. For the 06-07 harvest season SAMI was paid on a cost-plus basis by Marlin.
7 Marlin paid SAMI its labor cost plus an overhead of 42.5%.

8 49. On June 19, 2006, SAMI filed its application for temporary labor certification
9 with the U.S. Department of Labor for 150 H-2A workers to be employed as fruit harvest
10 workers from August 15, 2006 through March 31, 2007. The application was filled out by
11 the same attorney, William Marrs, that had previously represented SAMCO and was now
12 representing SAMI. The workers were again to be housed in the barracks at White Wing.
13 The application described the need for H-2A workers to work the same number of acres and
14 in the same locations, including the same 300 acres in Yuma, as had previously been
15 requested and approved for SAMCO in the 05-06 harvest season. SAMI made the same
16 assurances as did SAMCO and followed the same procedures dictated by the Department of
17 Labor and the Arizona Department of Economic Security in submitting its application.

18 50. The designated certifying officer with respect to SAMI's 06-07 application was
19 Marie C. Gonzalez. On June 27, 2006, the U.S. Department of Labor, through Ms. Gonzalez,
20 determined that SAMI's application contained conditions of employment that "will not
21 adversely affect U.S. worker's similarly employed." Ms. Gonzalez directed SAMI to
22 continue to cooperate with Arizona Workforce Connections to recruit workers, take
23 interviews, and document the interviews. In addition to running the specified newspaper
24 advertisements containing specific details of the job offer, Ms. Gonzalez required SAMI to
25 also run at least one radio ad containing the details of the offer. Further in terms of
26 complying with the assurance that SAMI would contact "qualified workers in other areas of
27 the State and/or nation by letter and/or by telephone," Ms. Gonzalez directed SAMI to
28 "contact former U.S. employees, and solicit their return to the job. All actions and responses

1 should be documented.”

2 51. Defendants in certain respects exceeded the requirements of Ms. Gonzales.
3 They ran Spanish and English advertisements on a local radio station and in local Yuma area
4 newspapers seeking to recruit workers to work from their White Wing facility. Despite the
5 requirement that they run a single radio ad, they ran two. Further, the state job service
6 solicited workers for the job opportunities at White Wing and set up job interviews with
7 SAMI for potential employees on pre-set dates. Although potential U.S. candidates set
8 appointments for job interviews with SAMI, only one of the job candidates presented himself
9 for the interview, and no U.S. candidates were hired to work at White Wing for the 06-07
10 harvest season.

11 52. SAMI did not mail any letters of recruitment to former U.S. employees
12 advertising the positions. SAMI had not previously housed workers at White Wing and thus
13 had not previously hired former U.S. migratory agricultural employees who had worked from
14 White Wing. An inadequate response was received from the advertisements and the state job
15 service agency recruitment to fill the positions needed by SAMI.

16 53. On July 14, 2006 Ms. Gonzalez granted SAMI the certification to employ 150
17 H-2A workers at White Wing. That certification specifically authorized work in the Yuma
18 fields specified in the application. It, too, was granted “subject to the conditions and
19 assurances made during the application process.”

20 54. The base of Defendant SAMI’s harvest operation during the 06-07 harvest
21 season was switched to White Wing, Arizona, a location at least 90 miles to the east of San
22 Luis. Single residential barracks at White Wing were used to house and feed workers. The
23 vast majority of these workers, if not all of them, were H-2A workers approved and certified
24 by the Department of Labor. When groves other than White Wing were to be harvested,
25 SAMI transported its harvest workers to those groves including groves at Eloy, Maricopa,
26 and in the Yuma Valley. At the end of the day the workers were transported from the groves
27 back to White Wing by SAMI.

28 55. SAMI conducted no operations in the 06-07 harvest season from the corralons

1 in San Luis. SAMI provided no transport from its former San Luis corralon to any of the
2 groves to be harvested during the 06-07 harvest season.

3 56. Richard De Leon testified that he made this decision to stop operations from
4 the San Luis corralon because when SAMI held its annual meeting at the McDonald's in San
5 Luis prior to the 06-07 season, only two of the five foremen from SAMI's previous season,
6 Leobardo Aguirre and Julio De La Rocha, appeared. Absent were Jose Castano, Jose
7 Gonzales and Humberto Gaxiola. Mr. De Leon testified that he was told by Oscar Aguayo
8 Jr., who he relied on to set up the meeting, that Aguayo could not contact Mr. Castano. Mr.
9 Aguayo also apparently told Mr. De Leon that he had heard that Jose Gonzalez and
10 Humberto Gaxiola were going to work for Yuma Mesa—a competing farm labor contractor.

11 57. Although Mr. De Leon knew that in the past the foremen began to reassemble
12 their crews after the annual meeting at the McDonalds in San Luis, he did not tell Mr.
13 Aguirre, or Mr. De La Rocha at the McDonald's meeting either to assemble or not to
14 assemble their crews. SAMI eventually hired Mr. Aguirre and Mr. De La Rocha during the
15 06-07 harvest season to supervise the H-2A crews at White Wing. Neither Mr. Aguirre nor
16 Mr. De La Rocha affirmatively recruited any of their former crew members to work for
17 SAMI for the 06-07 harvest season.

18 58. No testimony suggested that SAMI made any further effort to contact Mr.
19 Gonzalez or Mr. Gaxiola to confirm whether they would be working elsewhere. Both
20 testified that they were unaware of any McDonald's meeting being held prior to the 06-07
21 harvest season. Foreman Jose Gonzalez acknowledged in his testimony that he was never
22 promised work by SAMI prior to the 06-07 season. When his crew members made inquiry
23 that year, he told them that he did not get called by SAMI. He did not tell them why because
24 he did not know why. He was not promised employment by SAMI, he just expected it would
25 happen.

26 59. Foreman Humberto Gaxiola testified that during his previous employment for
27 SAMI, Oscar Aguayo would contact him a week or two before the season was to start and
28 confirm employment of his crew for that season. After he was contacted by Aguayo, Gaxiola

1 would begin contacting those who worked for him, and recruiting new workers if necessary.
2 In the 06-07 season, Gaxiola was never contacted by Aguayo or SAMI, and so he did not
3 contact his crew. That year, when members of his crew asked him when they were starting
4 he told them he had not been contacted by SAMI. When other companies started working
5 that season, he went to work for another company.

6 60. Prior to making its decision to base its operations uniquely out of White Wing,
7 SAMI did recruit at least one San Luis based crew.

8 61. SAMI, through Richard De Leon, arranged for a meeting with Mr. Castano at
9 a gas station in which he extended employment to Mr. Castano's crew for the 06-07 season.
10 Mr. Castano testified that he thereafter went out and recruited his crew, informing them that
11 they would be employed by SAMI. After his meeting with Mr. Castano, Mr. De Leon
12 determined that SAMI would not actively recruit, employ or transport San-Luis based crews
13 to harvest the groves in Yuma Valley or elsewhere. Despite these new determinations, Mr.
14 De Leon never had any subsequent conversations with Mr. Castano to inform him that
15 SAMI would not be employing his crew, or that his crew would have to either reside at
16 White Wing (free of charge) or arrange to travel there on a daily basis.

17 62. According to Mr. Castano, when it became clear that SAMI would not be
18 hiring his crew or transporting them to groves from the San Luis corralon, most of his crew
19 subsequently obtained work with another farm labor contractor, Border Harvesting, for the
20 06-07 season. Nevertheless, due to their earlier erroneous belief that they would be
21 employed by SAMI, and the later start by other farm labor contractors, they started such
22 employment approximately two weeks after SAMI began harvesting.

23 63. Harold Appling testified that sometime in July of 2006 Oscar Aguayo Jr. told
24 him that harvest season would begin about September 10th in the 06-07 harvest year. He
25 accordingly showed up at the corralon about that time and, when he discovered that SAMI
26 was not hiring, it took him between a week and two weeks to get a different job with another
27 harvester.

28 64. During the 06-07 harvest season, SAMI brought the H-2A workers that it

1 employed through the port of entry at San Luis and had buses available at a public parking
2 lot close to the border in San Luis to transport the H-2A workers to White Wing.

3 65. Cornelio Nunez-Gonzalez testified that when he witnessed this he approached
4 his previous foreman, Leobardo Aguirre, and “asked him for my job.” He was referred by
5 Mr. Aguirre to Richard De Leon, who indicated to him that SAMI would not be hiring
6 workers from the “San Luis” area this season. Mr. Nunez testified that he was upset that
7 SAMI was hiring foreign workers to do the work he had done in the past.

8 66. Pedro Lubiano-Cisneros testified that he asked his previous foreman, Julio
9 Cesar De La Rocha, for a job when he was in front of the bus picking up workers in the 06-
10 07 season. The more credible evidence, however, demonstrates that Mr. Lubiano-Cisneros
11 had not worked for Julio Cesar De La Rocha in the past, had not worked for SAMI in the
12 previous year, had never done extensive work for SAMI, and was already under the employ
13 of a different harvester for the 06-07 harvest season. The Court, thus does not find credible
14 Mr. Lubiano-Cisneros’s testimony that he applied for a White Wing job from SAMI during
15 the 06-07 harvest season.

16 67. Alejandro Duarte said he asked Salvador Covarrubias for a job at the border
17 when they were importing H-2As. “Salvador was there and I asked him for work personally.
18 But his answer was the same: that only contract workers will be working.” Nevertheless,
19 the court does not find this testimony credible. Alejandro testified that he wanted to go back
20 to work for SAMI. Yet the submitted documentary evidence demonstrates that Alejandro had
21 only worked for SAMI for very short periods in the past and he testified that he already had
22 a new job.

23 68. Raul Garcia Almeida testified that Oscar Agaayo Jr. was waiting at SAMI’s
24 corralon to instruct workers that SAMI was not hiring. Octavio Serrano, who was in the
25 courtroom during Mr. Almeida’s testimony, testified that he had a similar discussion with
26 Leobardo Aguirre who was waiting at SAMI’s corralon to instruct workers that SAMI was
27 not hiring. Gabriel Vargas, said that Oscar Agaayo Sr. was waiting at SAMI’s corralon to
28 instruct workers that SAMI was not hiring. Nevertheless, the Court does not find this

1 testimony credible because SAMI did not rent a corralon for the 06-07 harvest season. Since
2 it did not lease a corralon at San Luis, the Court finds it incredible that Defendants
3 supervisors and foremen were waiting there solely for the purpose of telling Plaintiffs that
4 they would not be rehired.

5 69. Although there was testimony at trial that Plaintiffs would have been willing
6 to take a harvesting job at White Wing and either reside in the barracks there or pay for their
7 own daily commute, the Court does not find such testimony credible. The testimony was that
8 it takes between two to three hours one-way to commute from San Luis to White Wing,
9 depending upon whether the transport is by car or by bus. There was credible testimony that
10 San Luis workers would not go to White Wing for jobs. Further, employees such as
11 Plaintiffs who lost their previous positions working for one farm labor contractor operating
12 out of the San Luis corralons were able to relatively quickly find another harvesting job there
13 that would not entail relocation to White Wing. Finally, in their responses to interrogatories
14 most of the Plaintiffs indicated they had formed no intent to work at White Wing during the
15 06-07 harvest season at the time they answered their interrogatories, suggesting that such
16 intent was formed after the initiation of this claim.

17 70. Although there was evidence presented at trial that a number of years before
18 the 06-07 harvest season a few of the Plaintiffs who now live at San Luis had done isolated
19 work at White Wing, and even stayed at the barracks during short periods, there was no
20 credible evidence that suggested that there was a custom or practice in 06-07 or in at least
21 several years preceding it, of recruiting agricultural workers at the San Luis corralons to
22 reside and/or work the harvest season in the barracks at White Wing.

23 71. On February 9, 2007, still during the harvest season, Plaintiffs filed a charge
24 of employment discrimination under 8 U.S.C. § 1324b with the United States Department
25 of Justice based on SAMI's employment of H-2A workers. Plaintiffs withdrew the charge
26 on September 7, 2007. This charge against SAMI was then dismissed by the Department of
27 Justice.

28

CONCLUSIONS OF LAW

Plaintiffs assert that, among other things, Defendants' failure to comply with the regulatory requirements of the H-2A program evidences Defendants' intent to discriminate against the nine U.S. citizen Plaintiffs that bring the § 1981 claim. Plaintiffs also claim that the regulatory requirements of the H-2A program either constitute an enforceable "working arrangement" between Plaintiffs and Defendants under the AWPAs, or have been by law incorporated into the contracts between Defendants and Plaintiffs as explicit provisions of those contracts. In either case, Plaintiffs contend that any violation of the H-2A program regulations constitutes a violation of the AWPAs as to all 171 Plaintiffs.

I. The H-2A Program

The H-2A program allows an employer who anticipates a shortage of available U.S. workers to apply to the United States Department of Labor for certification to bring into the country a certain number of temporary, non-immigrant foreign workers to accomplish specified labor during specified periods. Employers anticipating the need for H-2A workers are required to submit applications containing detailed information, including specifying the work to be done, its location, the anticipated period of the employment, the number of workers necessary to accomplish the labor, and the terms of the proposed employment. The application must also include an agreement to abide by the assurances required by the regulations pertaining to the recruitment of U.S. workers. *See, e.g.*, 20 C.F.R. §§ 655.101(b), 655.102(d) (2006).³ These assurances are set forth in 20 C.F.R. § 655.103(d), (e) and (f). The requirements set forth in 20 C.F.R. § 655.103(d)(4), which is the regulation principally at issue, include cooperating with and assisting the state employment agency (in this case the Department of Economic Security ("DES")) in publicizing the job opportunities, taking referrals for candidates, being available to provide interviews for such candidates, running advertisements with specified information in the newspapers, and contacting "qualified

³Unless otherwise stated the text of all regulations cited is from the April 2006 version of the Code of Federal Regulations (C.F.R.) Which was the version fo the regulations in place at the time of the events at issue here.

1 workers in other areas of the State and/or nation by letter and/or by telephone.”

2 The application must be submitted at least 45 days prior to the time that the employer
3 needs H-2A workers. *Id.* at § 655.101(c). It must also be filed with DES which will also
4 recruit any U.S. workers who may be willing to accept the offered employment. *Id.*, *see also*
5 *Id.* at § 655.104.

6 Certifying officers within the Department of Labor are required to conduct an initial
7 review of the application within seven days of its submission to determine if it contains
8 sufficient complying information to be “accepted for consideration and [whether] it meets
9 the regulatory standards.” *Id.* at § 655.101(c)(2), *see also* 655.100(a)(4). If the certifying
10 officer determines that the application thus qualifies, the Department of Labor issues notice
11 to the employer to that effect. *Id.* at §§ 655.101(c)(2), 655.104(b). Among other things, the
12 notice informs the employer of the specific efforts it must make while the application is
13 being considered “to carry out the assurances contained in § 655.103 with respect to the
14 recruitment of U.S. workers.” 20 C.F.R. § 655.105 (a). In formulating those requirements,
15 the certifying officer considers any information she or he may receive from others “that there
16 are a significant number of able and qualified U.S. workers who, if recruited, would likely
17 be willing to make themselves available for work at the time and place needed.” *Id.* In
18 making this determination the certifying officer “shall take into account other recent
19 recruiting efforts in those areas and will attempt to avoid requiring employers to futilely
20 recruit in areas where there are a significant number of local employers recruiting for U.S.
21 workers for the same types of occupations.” *Id.*

22 Thereafter, the certifying officer provides “overall direction to the employer and the
23 State agency with respect to the recruitment of U.S. workers.” *Id.* at § 655.105(b). Based
24 upon the success of the employer and the state agency in recruiting applicants for the
25 position, the certifying officer must determine within twenty days prior to the time when the
26 work is to begin whether to grant or deny the application, in whole or in part. *Id.* at §
27 655.105(d). Applications are to be granted if the certifying officer “has determined that the
28 employer has complied with the recruitment assurances and the adverse effect criteria . . . by

1 the date specified.” *Id.* at § 655.106(b)(1).

2 To further protect U.S. workers, once an application has been granted, program
3 regulations require an employer to hire any qualified U.S. workers who apply for the same
4 employment performed by the H-2A workers during the first 50 percent of the term of the
5 H-2A contract. *Id.* at § 655.103(e).

6 Further, the H-2A regulations set forth administrative remedies for those instances in
7 which an H-2A application involves possible fraud or material misrepresentation. *Id.* at §
8 655.108. There are additional administrative remedies provided when, after an application
9 has been granted, the certifying officer “has reason to believe that an employer violated a
10 material term or condition of the H-2A certification.” *Id.* at § 655.110 These administrative
11 procedures provide for investigation, hearing, and classification of the extent of violation,
12 and for penalties, including the employer’s disqualification from consideration for H-2A
13 workers in the following years. *Id.*

14 **II. Discrimination Claim (42 U.S.C. § 1981)**

15 To prevail on their § 1981 claim, the nine Plaintiffs bringing this claim must
16 demonstrate that it is more probable than not that the Defendants intentionally discriminated
17 against them because they are United States citizens. *See, e.g., Robinson v. Adams*, 847 F.2d
18 1315, 1316 (9th Cir. 1987), *cert. denied*, 490 U.S. 1105 (1989); *Craig v. Los Angeles Cnty.*,
19 626 F.2d 659, 668 (9th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981). Plaintiffs have not met
20 that burden.

21 The Court finds it more likely than not that Plaintiffs were not hired for the positions
22 at White Wing because they did not apply for employment there. Plaintiffs may have
23 refrained from applying for work at White Wing either because they were not aware of the
24 availability of such work, or because they believed that seasonal agricultural work which
25 would allow them to live in their own homes would be made available for the 06-07 harvest
26 season at the corralons at San Luis, through SAMI or otherwise. The fact that such work was
27 not provided by SAMI does not constitute intentional discrimination by the Defendants
28 against the nine U.S. citizen Plaintiffs, especially when such work was advertised and

1 Plaintiffs did not apply for it.

2 The workers that SAMI hired and transported from the corralon at San Luis to the
3 groves to be harvested in Yuma Valley during the 04-05 and 05-06 harvest seasons, including
4 all 171 Plaintiffs, were, by definition, seasonal agricultural workers. A “‘seasonal
5 agricultural worker’ . . . is not required to be absent overnight from his permanent place of
6 residence” 29 U.S.C. § 1802(10)(A).⁴

7 The terms of the only employment offered by SAMI during the 06-07 harvest season,
8 however, included housing at, and work based from, White Wing, which was at least 90
9 miles away from San Luis. The standard terms of employment thus offered room and board,
10 and contemplated neither the SAMI employees being able to live at home, nor SAMI
11 providing daily transportation from San Luis to the fields to be harvested or to White Wing

12 During the previous seasons from 03-04 through 06-07, none of the Plaintiffs applied
13 for or sought work at White Wing. Plaintiffs all lived within the area in which the migratory
14 farm work available at White Wing had been advertised both by radio and in the newspaper
15 as well as through the state job service recruitment. Credible testimony at trial established
16 that at least some, if not all, workers recruited at the corralon at San Luis would not live in
17 the housing at White Wing and work from there. None of the § 1981 Plaintiffs responded to
18 such advertisements or sought employment in which they would have been situated out of
19 White Wing. They were aware that H-2A workers harvested from White Wing during the
20 citrus harvest season.

21 Further, owners of citrus groves in central Arizona did not recruit harvest workers at
22 the corralons at San Luis for a number of years preceding the 06-07 harvest season. This is
23 because available workers do not come to the corralons at San Luis to be recruited until the
24 employers indicate that the harvest season is about to start. And employers for fields in
25

26 ⁴By contrast, a “migrant agricultural worker” is, among other things “required to be
27 absent overnight from his permanent place of residence.” 29 U.S.C. § 1802(8)(A). H-2A
28 workers are separately regulated and, by definition, are excluded from being either seasonal
or agricultural workers. 29 U.S.C. § 1802(8)(B)(ii) & (10)(B)(iii).

1 central Arizona need to identify the workers willing to work their fields well before the
2 beginning of harvest season to determine whether they may, pursuant to regulatory
3 requirements, import H-2A workers to harvest their groves. As a result, it was not practical
4 for U.S. employers with fields in central Arizona to wait until the beginning of harvest season
5 to recruit at the San Luis corralons for harvest workers.

6 For the 06-07 harvest season Defendants actively recruited U.S. workers to accept the
7 positions offered at White Wing in the way that SAMCO had done in the previous three
8 years. Defendant SAMI ran radio spots and newspaper advertisements in the Yuma area
9 advertising the positions and describing the terms on which such employment would be
10 offered. The seasonal agricultural workers previously employed by SAMI, who are Plaintiffs
11 here, all lived within the area in which the migratory farm work available at White Wing had
12 been advertised both by radio and in the newspaper as well as through the state job service
13 recruitment. None of them responded to such advertisements.

14 Arizona Work Connections recruited and set up job interviews for candidates with
15 SAMI for the White Wing employment at pre-appointed times and locations. In the absence
16 of sufficient workers applying for the White Wing based employment, the Department of
17 Labor authorized SAMI to employ 150 H-2A workers to be housed at White Wing. In
18 following this process SAMI merely followed the same recruitment procedure to hire
19 roughly the same number of H-2A workers to work and reside in the same location as had
20 its predecessor SAMCO for the previous three years. SAMI did so with the active
21 participation and authorization of both the U.S. Department of Labor and Arizona's
22 Department of Economic Security.

23 Defendants do not need to do more than this to refute the argument that they had
24 discriminatory intent in failing to hire the § 1981 Plaintiffs in this case for the 06-07 harvest
25 season.

26 Plaintiffs assert that Defendants' discriminatory intent is nevertheless established by
27 their failure to comply with the requirement set forth in the acceptance letter sent to
28 Defendants by the Department of Labor on June 27, 2006. In that acceptance letter, the

1 Department of Labor instructed SAMI to “Contact former U.S. employees, and solicit their
2 return to the job.” But, while SAMI had previously employed seasonal agricultural workers
3 at the corralons in San Luis, SAMI had never previously employed migratory agricultural
4 workers who lived and worked out of White Wing. SAMI’s seasonal agricultural workers
5 at San Luis did not constitute former migrant farm workers from White Wing. There were,
6 therefore, no former U.S. employees for SAMI to solicit “to return to th[at] job.” Because
7 SAMI was a first time applicant for H-2A workers in Arizona, the Department of Labor
8 certifying officer would have had a rational basis to certify SAMI’s H-2A request.

9 Plaintiffs also argue that Defendants’ assertion that it decided to change its operational
10 hub to White Wing in 06-07 is not worthy of credence because it is inconsistent with
11 Defendants’ testimony at trial that they decided to quit their operations out of the San Luis
12 corralon only after three of their five foremen did not show up at the at the MacDonald’s in
13 San Luis for the meeting prior to the 06-07 harvest season.

14 A number of facts are uncontested, however. First, it is uncontested that the 06-07
15 harvest season was the first season in which SAMI would be assuming responsibility for
16 harvesting Marlin’s groves in central Arizona at White Wing, Eloy, and Maricopa.
17 Previously that part of Marlin’s harvest had been accomplished by SAMCO. Further, the
18 evidence is uncontested, that after the pre-harvest meeting at McDonalds, Richard De Leon
19 did arrange to meet with Jose Castano and did tell him that his crew would be employed out
20 of San Luis for the 06-07 harvest season. Thus, the Court concludes that SAMI did not
21 determine to wholly abandon its operations out of San Luis until sometime after it had
22 offered employment to Jose Castano and his crew. This was, at the most, only a few weeks
23 before the harvest season began, and it was also after SAMI had submitted its application for
24 H-2A workers to the Department of Labor. As a result, SAMI had not determined, when it
25 submitted its H-2A application, that it would not be hiring U.S. workers at the corralon at San
26 Luis, and the authorization it received to hire H-2A workers was not used as a ruse to
27 discriminate against the nine U.S. citizen Plaintiffs.

28 Plaintiffs also assert that Defendants’ failure to comply with the fifty percent rule

1 demonstrates intent to discriminate. The fifty percent rule requires an employer of H-2A
2 workers to hire any U.S. worker who applies for employment being performed by H-2A
3 workers anytime during the first half of the H-2A contract term. After carefully listening to
4 the testimony offered at trial, the Court cannot determine that any of the § 1981 Plaintiffs
5 actually subsequently applied to Defendants for what would for them have been migratory
6 agricultural work at White Wing. Only two of the nine § 1981 Plaintiffs, Raul Garcia
7 Almeida and Octavio Serrano, testified that they asked someone at SAMI to have their jobs
8 back. Not only does the Court not find their testimony credible, for the reasons stated above,
9 but, asking to have back a job that was seasonal agricultural employment, is not the same
10 thing as applying for a position as a migratory farm worker.

11 During the season at issue, the H-2A workers at White Wing received the same pay
12 and benefits as had been offered to U.S. workers for that employment. Nevertheless,
13 Plaintiffs argue, SAMI was not required to pay the employer's tax for social security on H-
14 2A workers that it was required to withhold and pay for U.S. workers. The Court, however,
15 does not, in this case, find this a credible basis on which to infer an intent to discriminate.
16 SAMI was employed by Marlin on a cost-plus basis. For the 06-07 harvest season Marlin
17 paid SAMI its labor cost plus an overhead of 42.5%. Therefore, to the extent that SAMI
18 would have had to pay the employer's tax for social security for some or all of its employees,
19 these amounts would have presumably been reimbursed, together with the 42.5% overhead
20 to SAMI from Marlin. It would not, therefore, have been cheaper for SAMI to employ H-2A
21 workers. Even had the extra withholding caused the Marlin Defendants additional expense,
22 Defendants have convinced the Court that the additional costs incurred in recruiting,
23 transporting, housing and feeding the H-2A workers more than offset the additional expense
24 incurred by the additional withholding. There was, therefore, no sufficient motivation in the
25 expense incurred in hiring the nine United States citizens as workers, to suppose that it was
26 a motivation for discriminating against them.

27 In short, the Court finds that the § 1981 Plaintiffs have not met their burden of proof
28 of establishing that Defendants intentionally discriminated against them due to their status

as United States Citizens.

III. AWP Claims

The AWP sets forth remedial statutes designed to protect “seasonal agricultural workers” and “migrant agricultural workers.” All parties acknowledge that Plaintiffs were seasonal agricultural workers within the meaning of 29 U.S.C. § 1802(10)(A).⁵ The Court will thus proceed with an AWP analysis under the statutory protections for seasonal agricultural workers set forth in 29 U.S.C. §§ 1831 and 1832 (2009).⁵ The AWP definitions for both “seasonal agricultural workers” and “migrant agricultural workers” explicitly exclude H-2A workers. 29 U.S.C. § 1802(8)(B)(ii) & (10)(B)(iii) (2009).

A. Working Arrangements (29 U.S.C. § 1832(c))

Pursuant to the requirements of 29 U.S.C. § 1832(c) “no farm labor contractor . . . shall without justification, violate the terms of any working arrangement made by that contractor . . . with any seasonal agricultural worker.” Plaintiffs claim that Defendants have violated the AWP by violating working arrangements between the Defendants and the Plaintiffs in four separate ways.

1. End of Season Statements.

Plaintiffs first claim that Defendants created a “working arrangement” with Plaintiffs that they would be employed for the 2006-07 harvest season by engaging in the custom or

⁵Despite the stipulation in the pretrial order that Plaintiffs are “seasonal agricultural workers.” Plaintiffs also appear to seek the statutory protections afforded to “migratory agricultural workers” under the statute. Although separate subchapters apply to “seasonal agricultural workers” and “migrant agricultural workers” under the statute, the protections are, in most respects, identical. Farm labor contractors are prohibited by the statute from violating, without justification, the terms of any “working arrangement made by [a farm labor] contractor, employer or association with any seasonal agricultural worker” or migrant agricultural worker. 29 U.S.C. §§ 1822(c) & 1832(c). The AWP further prohibits any such employer from “providing false or misleading information” of a certain type to migrant or seasonal agricultural workers. 29 U.S.C. §§ 1821(f) & 1831(e). Although there are some distinctions that apply as it pertains to the separate statutes protecting migrant farm workers from being provided with false or misleading information, they are not relevant to the Court’s analysis in this case. The analysis therefore, is the same regardless of whether either or both statutory protections are applied.

1 practice of having their supervisors or foremen state to Plaintiffs at the finish of their work
2 during the 06-07 harvest that they “would see them again next year,” or equivalent
3 statements. Even assuming the truth of such testimony, such statements between Defendants
4 and Plaintiffs fail to create a “working arrangement” protected by AWPAA that would require
5 the Defendants to rehire Plaintiffs as seasonal agricultural workers for the 06-07 harvest
6 season.

7 As is apparently uncontested here, Marlin’s available fields to harvest in the Yuma
8 Valley declined from the 05-06 season to the 06-07 season. And the very nature of seasonal
9 agricultural work is dependent upon a number of factors. To the extent that SAMI’s foremen
10 may have said something to their workers to the effect that they would see them again during
11 the 06-07 harvest season, it cannot reasonably be interpreted as a “working arrangement”
12 binding SAMI to give them employment as seasonal agricultural workers during the 06-07
13 harvest season. As Foreman Gonzalez testified, he did not understand this statement to be
14 a promise by SAMI to employ him the next year, but he did expect that he would be able to
15 work for SAMI again the following year. Such an expectation, however, does not give rise
16 to a “working arrangement” enforceable under the statute.

17 Even were the Court to find that a working arrangement existed, it would not accept
18 Plaintiffs claim that such “working arrangement” extended beyond the actual type of
19 employment Defendants had previously offered to Plaintiffs. That is, Plaintiffs had
20 previously been employed by SAMI as seasonal agricultural workers. They now assert that,
21 under the AWPAA, the assurance that SAMI would see them again next year means that SAMI
22 bound itself to reserve migrant agricultural work for them, even when they had never been
23 so employed by SAMI and even when they had failed to apply for the migrant agricultural
24 work when it had been advertised in their community. Even if an enforceable working
25 arrangement existed under these circumstances it would not extend so far.

26 2. Letters Prior to Harvest Season

27 There was no custom and practice by which Defendants sent out letters to past
28 employees prior to the beginning of a new harvest season to solicit their re-employment with

1 Defendants. The evidence demonstrates that DES, but not SAMI, sent out letters to former
 2 SAMCO workers prior to the beginning of the 04-05 season. Defendants' failure, therefore,
 3 to send out letters to its past seasonal agricultural workers advertising migrant farm worker
 4 positions at White Wing did not violate any "working arrangement" it had with Plaintiffs.

5 **3. H-2A Regulations**

6 Plaintiffs' base their H-2A argument on two separate premises. First they claim that
 7 Defendants did not comply with an H-2A regulation pertaining to the recruiting of U.S.
 8 workers. Second they assert that a few of the Plaintiffs asked to be re-employed by
 9 Defendants and were not employed in violation of the fifty percent rule.

10 **a. H-2A Recruitment Regulations and Orders (20 C.F.R. § 103(d)(3))**

11 Defendants ran both radio and newspaper ads in the Yuma area designed to recruit
 12 workers to their White Wing facility prior to recruiting H-2A workers. Defendants also
 13 coordinated with DES Job Service to recruit such U.S. workers. Plaintiffs assert, however,
 14 that Defendants failed to comply with 20 C.F.R. § 655.103(d)(3) which requires Defendants
 15 to "cooperate with [DES] in the active recruitment of U.S. workers by . . . (3) Cooperating
 16 with [DES] and independently contacting farm labor contractors, migrant workers, and other
 17 potential workers in other areas of the State and/or Nation by letter and/or telephone."

18 The H-2A regulations allow the Department of Labor to give content to this otherwise
 19 limitless obligation by providing notice in the clearance order "of the specific efforts which
 20 will be expected from them during the following weeks to carry out the assurances contained
 21 in § 655.103 with respect to the recruitment of U.S. workers." 20 C.F.R. § 655.105. On June
 22 27, 2006, the U.S. Department of Labor issued its clearance order in which it defined this
 23 obligation as "contacting all former U.S. workers, soliciting their return to the job, and
 24 documenting its attempts to do so." Defendants stipulate that they personally contacted no
 25 U.S. workers between then and the time that the Department of Labor approved their H-2A
 26 application, and, as a result, they documented no such efforts. The Department of Labor,
 27 nevertheless, approved Defendants' H-2A application in sufficient time to allow Defendants
 28

1 to recruit H-2A workers prior to the beginning of the 06-07 harvest season.

2 Instead of asking this Court to review the Department of Labor's determination that
3 the Defendants had adequately complied with their specific requirements for recruiting U.S.
4 workers, the Plaintiffs request that the Court deem those specific requirements as
5 incorporated into their "working arrangement" with the Plaintiffs under the AWPAs as a
6 matter of law. They then ask the Court to impose AWPAs's statutory damages on the
7 Defendants for failing to qualify with the conditions imposed upon them by the Department
8 of Labor, even though the Department of Labor determined that Defendants had adequately
9 complied with their recruitment requirements.

10 Such a request is unworkable and unfair. Plaintiffs provide this Court with no case
11 in which a court has incorporated H-2A requirements pertaining to the recruitment of U.S.
12 employees as part of the "working arrangements" between U.S. employees and their
13 employer protected under the AWPAs. To be sure for purposes of applying the AWPAs's
14 protections, the "working arrangement" between agricultural workers and their employer
15 may include specific worker protections included in federal or state law. These would
16 include laws that govern the employment relationship between the employee and the
17 employer, such as state laws specifying the wages that are due the employee. Nevertheless,
18 an AWPAs "working arrangement" generally constitutes only "the terms of employment
19 actually communicated between employer and employee." *Doe v. D.M. Camp & Sons*, 624
20 F. Supp. 2d 1153, 1172 (E.D. Cal. 2008). *See also Valenzuela v. Giumarra Vineyards Corp.*,
21 619 F. Supp. 2d 985, 990–91 (E.D. Cal. 2008). "It does not automatically encompass any
22 and all statutes and regulations governing agricultural employment." *Valenzuela*, 619 F. Supp.
23 2d at 993.

24 The specific recruitment obligations at issue here are imposed by the certifying officer
25 on the employer as deemed necessary for compliance with 20 C.F.R. § 655.103(d)(3). They
26 are not "terms of employment actually communicated between employer and employee."
27 *D.M. Camp & Sons*, 624 F. Supp. 2d. at 1172. They do not impose a direct responsibility on
28 the employer with respect to any U.S. worker who is a Plaintiff in this action. The regulatory

1 obligation to “independently contact[] farm labor contractors, migrant workers, and other
2 potential workers in other areas of the State and/or Nation by letter and/or telephone,” 20
3 C.F.R. § 655.103(d)(3), is designed to be interpreted by the Department of Labor with the
4 undefined regulatory requirement being adjusted to the specific circumstances of each case.
5 The regulations specify that it is up to the certifying officer to determine “the specific efforts
6 which will be expected from [the employer] during the [application period] to carry out the
7 assurances contained in § 655.103 with respect to the recruitment of U.S. workers.” 20
8 C.F.R. § 655.105. It is further up to the certifying officer to determine whether the employer
9 has complied with that obligation.

10 Thus the recruiting requirement which Plaintiff would have the Court incorporate into
11 the working arrangement was designed to be imposed by the certifying officer; its
12 requirements were to be interpreted and adjusted by the certifying officer; and the certifying
13 officer is the appropriate person mandated under the regulations to determine compliance.
14 Further, these considerations are to be evaluated in the context of the certifying officer
15 determining whether an H-2A certification should be granted to the employer. These
16 recruitment regulations and others like them are not part of the “working arrangement”
17 between an employer and its employees. To recognize it as such would contradict the
18 clearance order’s purpose of defining the employer’s obligation, would afford no deference
19 to the Department of Labor, which, according to the regulations themselves, is the
20 appropriate entity to decide the question, and would subject the Defendants to potentially
21 expensive and inconsistent determinations concerning their compliance with the recruitment
22 obligations imposed by the Department of Labor.

23 In cases like this one in which the employer has not previously hired migrant farm
24 workers at a particular location, it has no previous employees that can be efficiently recruited
25 to return to work. And, nothing about the general regulation, or DES’s implementation of
26 it in this case, afforded any specific obligation with respect to any of the Plaintiffs.

27 Further, to the extent a party obtains its certification through fraud or
28 misrepresentation, the H-2A regulations provide an administrative remedy through which

1 Plaintiffs could have pursued relief that would restrict, to varying degrees, the H-2A
2 activities of the Defendant. 20 C.F.R. § 655.108 (2006). Plaintiff sought no such relief. It
3 is, therefore, not appropriate in this instance to permit such relief by deeming the recruitment
4 requirements of the H-2A program incorporated into the “working arrangement” protections
5 of the AWP.

6 Plaintiffs made no specific argument at trial, or in their pre or post-trial briefing, that
7 the number of acres that the Department of Labor had authorized Defendants to harvest in
8 the Yuma Valley with H-2A workers was incorporated into their working arrangement with
9 Plaintiffs or otherwise enforceable by the AWP. In the absence of such an argument or
10 evidence,⁶ the Court need not decide whether the AWP would prevent Plaintiffs from
11 exceeding those limits. The Court further notes that, at any rate, there is an administrative
12 procedure provided as part of the H-2A regulations through which Plaintiffs may seek relief
13 when Defendants fail to comply with the terms of the H-2A certification they have received
14 from the Department of Labor, such as the number of acres Defendants could harvest with
15 H-2A workers. 20 C.F.R. § 655.110 (2006) (indicating administrative procedure to follow
16 when the certifying officer “has reason to believe that an employer violated a material term
17 or condition of the H-2A certification”). Plaintiffs apparently pursued no such relief. In any
18

19 ⁶In response to the Court’s questions at trial, Mr. De Leon indicated that in the 06-07
20 harvest SAMI attempted to harvest all the available acreage in Yuma Valley that had been
21 harvested by both SAMI and SAMCO in previous years. Nevertheless, William Chaney
22 testified that prior to the 06-07 harvest season, the Marlin entities had sold off and retired
23 some of its citrus acreage in the Yuma Valley, and he further testified that other farm labor
24 contractors such as Dominguez and Galindo & Galindo had to be hired to complete the 06-07
25 harvest in the Yuma Valley since SAMI could not do so. In their written arguments
26 submitted in this matter, Defendants have asserted that they did not harvest any more acres
27 in the Yuma Valley in the 06-07 harvest season than the 300 specific acres SAMI was
28 authorized to harvest by the Department of Labor. Although Plaintiffs have submitted a
number of exhibits from which the fields harvested by SAMI in the Yuma Valley that season
could possibly have been determined, Plaintiffs have not introduced evidence interpreting
the invoices or documents or otherwise suggesting that SAMI in fact harvested more than
the 300 acres in Yuma Valley. Therefore, the Court cannot conclude based on the evidence
submitted that the amount exceeded the 300 acres authorized by the Department of Labor.

1 event, in the absence of sufficient evidence for the Court to determine whether, in fact,
2 Defendants exceeded the authorized limit of their harvest in the Yuma Valley with H-2A
3 workers, the Court need not determine whether such terms could be incorporated into the
4 AWPAs protection of working arrangements between employer and employee.

5 **c. H-2A Fifty Percent Rule (20 C.F.R. § 103(e))**

6 In contrast to the recruitment provisions and certification provisions, the fifty percent
7 rule imposes an affirmative and specific duty on an H-2A employer with respect to its U.S.
8 employees or prospective employees. The fifty percent rule is not subject to interpretation
9 or adjustment by the Department of Labor, and it does not relate to the certification
10 determination that the Department of Labor must make in a very specific and time-sensitive
11 period. It may, therefore, constitute part of the “working arrangement” between an H-2A
12 employer and a U.S. employee who applies for employment being performed by H-2A
13 workers during the first half of the contract period. The fifty percent rule provides that “the
14 employer . . . shall provide employment to any qualified eligible U.S. worker who applies
15 to the employer until 50% of the period of the work contract, under which the foreign worker
16 who is in the job was hired, has elapsed.” 20 C.F.R. § 103(e). The regulation further
17 provides that “the employer shall offer to provide housing and the other benefits, wages, and
18 working conditions required . . . to any such U.S. worker and shall not treat less favorably
19 than H-2A workers any U.S. worker referred or transferred pursuant to this assurance.” *Id.*

20 The Court, however, has no need to determine the question in this case because
21 Plaintiffs, ultimately, have been unsuccessful in establishing at trial that any of them
22 subsequently applied for the White Wing employment. As the Court has already observed,
23 it does not consider the testimony of Raul Garcia Almeida, Octavio Serrano, Pedro Lubiano-
24 Cisneros or Alejandro Duarte to the effect that they asked to have their jobs back, credible.

25 Finally, Cornelio Nunez-Gonzalez testified that when he witnessed SAMI foremen
26 loading the H-2A workers on SAMI buses he approached his previous foreman, Leobardo
27 Aguirre, and asked to have his job back. He testified that he was referred by Mr. Aguirre to
28 Richard De Leon, who indicated to him that SAMI would not be hiring workers from the

1 “San Luis” area this season. Mr. Nunez testified that he was upset that SAMI was hiring
2 foreign workers to do the work he had done in the past. Although Richard De Leon firmly
3 denied having such a conversation with Mr. Nunez-Gonzalez, the Court need not resolve that
4 conflict here to determine that the fifty percent rule was not invoked.

5 To invoke the fifty percent rule, an employee must apply to the employer for the
6 employment being performed by H-2A workers. The questions posed by counsel to Mr.
7 Nunez-Gonzalez all made it clear that Mr. Nunez-Gonzalez testified that he asked Mr.
8 Aguirre and Mr. De Leon to have his job “back.” Nevertheless, for the reasons already
9 discussed at length, SAMI offered no jobs for “seasonal agricultural workers” out of the
10 corralons at San Luis during the 06-07 harvest season, which was the job that Mr. Nunez-
11 Gonzalez had held with SAMI. To the extent that Mr. Nunez-Gonzales did ask to have his
12 job back, he was not asking to have employment at White Wing. SAMI had, previous to the
13 commencement of the season, advertised and offered positions out of White Wing to workers
14 in the San Luis area. None had applied for such employment which would have, for most
15 of them, been migratory farm work as opposed to seasonal agricultural work. The White
16 Wing work was the work that had been accepted and was being performed by the H-2A
17 workers. Based on his trial testimony, the Court concludes that Mr. Nunez-Gonzalez did not
18 apply for employment at White Wing.

19 Plaintiffs nevertheless allege that if and when any of the Plaintiffs did ask Defendants
20 for their jobs back, Defendants were under an obligation with respect to these Plaintiffs to
21 explain to them the terms of the employment that they were offering at White Wing.
22 However, the regulation imposes no such obligation. It is true that had such application for
23 employment at White Wing been made, the regulation obliges Defendants to “provide
24 housing and the other benefits, wages, and working conditions . . . to any such U.S. worker
25 and shall not treat less favorably than H-2A workers any U.S. worker referred or transferred
26 pursuant to this assurance.” 20 C.R.F. § 103(e). But this regulation does not impose upon
27 Defendants the obligation to solicit applications from Plaintiffs for employment different
28 than that applied for by Plaintiffs in previous years.

4. Offer of Employment to Castano's Crew

It is uncontested that just prior to the 06-07 harvest season Richard De Leon offered employment with SAMI to Jose Castano and his crew. The Court further finds that when Mr. De Leon did so, he knew that Jose Castano would begin to recruit his crew, and that his crew would have a reasonable expectation of being employed by SAMI as seasonal agricultural workers out of the corralon at San Luis for the 06-07 harvest season. Based on the evidence adduced at trial, however, the Court determines that when De Leon offered the seasonal agricultural employment to Castano and his crew, De Leon had not yet made the decision, and thus did not know, that SAMI would not be offering seasonal agricultural employment out of the corralons at San Luis. Therefore, his offer was not in violation of those sections of the AWPAs which prohibit *knowingly* providing false or misleading information to a migrant or seasonal agricultural worker "concerning the terms, conditions, or existence" of employment. 29 U.S.C. §§ 1821(f) & 1831(e).⁷

Nevertheless, the Court further finds that initiating such recruiting directly prior to the commencement of the harvest season at San Luis was part of the standard practice between SAMI and its San Luis-based crews. SAMI engaged in this practice to commit working crews to SAMI's employment during the upcoming harvest season. When, after initiating the recruitment of Mr. Castano's crew, Defendants made the decision that they would not provide employment to Mr. Castano's crew or anybody else from the corralon at San Luis, they violated the "working arrangement" that they had undertaken with Mr. Castano's crew. The Court further finds as a matter of fact that neither Mr. De Leon, nor anyone else at SAMI took adequate steps to inform Mr. Castano or his crew prior to the beginning of the season that SAMI would actually not be employing workers for that season from the San Luis corralon. The Court further finds that, as a result, many of the members of Mr. Castano's

⁷To the extent that the Plaintiffs assert that the protections applicable to migrant agricultural workers apply, SAMI was, at this point, only recruiting Mr. Castano's crew for seasonal agricultural labor, and thus only those AWPAs protections pertaining to seasonal agricultural workers are arguably applicable.

1 crew who had been recruited to work for SAMI for the 06-07 harvest season, were
2 unemployed for some period at the beginning of the harvest season while they sought work
3 with a different harvest employer. As a result, Defendants, as joint employers, violated the
4 provisions of 29 U.S.C. § 1832(c).

5 This violation entitles those workers, that the Court finds were actually recruited, to
6 statutory damages authorized by 29 U.S.C. § 1854. Plaintiffs seek an award of statutory
7 damages under the statute, and the statute authorizes the Court to award “up to \$500 per
8 plaintiff per violation.” 29 U.S.C. § 1854(c)(1) (2009).

9 The Court has reviewed the testimony of Mr. Castano and others at trial to identify
10 those Plaintiffs that Mr. Castano recruited for SAMI during the 06-07 harvest season. The
11 Court has then compared the identified Plaintiffs with their work histories with SAMI to
12 assess (a) the likelihood that they were actually recruited by Mr. Castano to work for SAMI
13 for the 06-07 harvest season, (b) the likelihood that they suffered economic damages by
14 missing work they could have otherwise performed for SAMI while searching for work with
15 a different employer, (c) the pay that Plaintiffs would have received for work during the
16 period necessary to find other employment, and, (d), the lack of evidence that Plaintiffs made
17 an attempt to resolve the issues in dispute before the resort to litigation. 29 U.S.C.
18 § 1854(c)(2) (2009).

19 After conducting this analysis the Court awards the following amounts to the
20 following Plaintiffs. The Court awards \$500 in statutory damages to (1) Raul Garcia, (2)
21 Reynaldo Guerra Jimenez, (3) Fernando Duarte Ochoa, (4) Alberto Miranda Haros, (5)
22 Antonio Fuentes, (6) Francisco Duarte Rascon, (7) Guadalupe Espinoza, (8) Jorge Delgado,
23 (9) Juan Rodriguez Orosco, and (10) Raul Garcia Almeida.

24 The Court awards \$250 to (1) Gustava Zerega Espinoza, (2) Carlos Manuel Palacios
25 Torres, (3) Rafael Beltran Nunez, (4) Alfredo Avalos Barron, (5) Jesus Medina Uriarte, (6)
26 Jose Botillo Avila, (7) Pedro Angulo, (8) Saul Gonzales, (9) Marcos Amezcua, (10) Teodoro
27 Loya Carillo.

28 The Court awards \$150 to (1) Javier Rendon Aguilera, (2) Francisco Cervantes Gil,

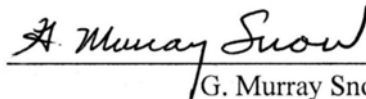
(3) Aurelio Quinonez Armenta, (4) Graciela Reyes Medina, (5) Jesus Antonio Penunuri, (6) Jose Contreras, (7) Jose Sepulveda, and (8) Trinidad Medina.

Although there was testimony that the following Plaintiffs were recruited by Jose Castano, the Court finds in light of their past employment with SAMI either that it is not credible that they were recruited by Mr. Castano, or that in equity, they did not suffer any loss in transitioning from SAMI to another employer in the 06-07 harvest season: (1) Alejandro Duarte, (2) Jose Valdez, (3) Mario Castro, (4) Octavio Serrano, and (5) Sergio Amescua.

No other Plaintiffs are awarded relief on any of their other claims.

A form Judgment Order shall be lodged with the Clerk of the Court **within fourteen (14) days** of the date of this Order.

DATED this 27th day of March, 2012.



G. Murray Snow
United States District Judge